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ATTORNEY FOR APPELLANT:

JAMES R. RECKER, II
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

PHYLLIS DEAN,

Appellant-Plaintiff,

vs.

JACK P. REED,

Appellee-Defendant.

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No. 49A04-0602-CV-72

APPEAL FROM THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM THREE
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0111-CP-1866

March 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant, Phyllis Dean, challenges the trial court's grant of summary judgment in favor of Appellee, Jack P. Reed. Upon appeal, Dean presents three issues, which we consolidate and restate as whether the trial court erred in granting summary judgment in favor of Reed where Reed had filed no motion for summary judgment and Dean had filed for partial summary judgment only.

We reverse and remand.

The record reveals that Dean was leasing from Reed a certain business premises in Indianapolis. Dean paid rent directly to Reed, who owned the premises in question. Dean is a licensed cosmetologist who was operating a beauty shop and tanning salon known as "Incredible Images." On November 2, 2001, Reed changed the locks on the premises and refused Dean access to the building. Dean asserts that she had personal property located in the premises valued at almost \$26,000.

On November 19, 2001, Dean filed in the Decatur Township Small Claims Court a pro se action against Reed for wrongful eviction. Although it is not clear from the record precisely when, Reed at some point moved to have the case transferred to the plenary docket of the Marion Superior Court. Dean soon obtained trial counsel and on December 11, 2001, filed a complaint for damages and a demand for a jury trial. This five-count complaint alleged wrongful eviction, a claim of conversion under the Indiana Crime Victims Relief Act, defamation, and negligence, and sought punitive damages. Reed filed an answer to this complaint on March 20, 2002. After this, the case lingered with little action. The trial court sent "call of the docket" notices to both parties and even set an attorney conference, but neither party appeared. At a second pre trial conference held

on October 21, 2002, Reed apparently indicated that he planned to file a motion for summary judgment. Over a year later, on November 13, 2003, with no action taking place, the trial court again sent call of the docket notices to the parties. On January 9, 2004, the trial court dismissed the action under Indiana Trial Rule 41(e) for failure to prosecute and sent notices to both parties.

This must have spurred Dean to action because the chronological case summary (“CCS”) entry for January 22, 2004 states that the “CASE HAS BEEN REDOCKETED.” App. at 3. Thereafter, the case was again set for a call of the docket, but the court removed the case therefrom on June 6, 2004 upon motion by Dean. (A-3). In doing so, the trial court’s CCS entry noted, “PLAINTIFF SHALL PROCEED WITH PROSECUTION OF THIS ACTION.” App. at 3. On June 9, 2004, the trial court granted the request to set a pretrial conference and scheduled a conference for August 9, 2004. Again, neither party appeared for the scheduled conference. On October 8, 2004, Dean moved for a jury trial, and on March 22, 2005, the trial court set a trial date of February 14, 2006.

On June 6, 2005, Dean filed a motion for partial summary judgment along with an accompanying memorandum and designated evidence. This motion sought summary judgment upon the issue of conversion. On June 21, 2005, the trial court scheduled a summary judgment hearing to take place on July 29, 2005. On July 28, 2005, the day before the scheduled summary judgment hearing, Reed moved for a continuance. The trial court belatedly granted the motion on August 17, 2005 and rescheduled the hearing for September 19, 2005. At the September 19 hearing, however, neither Dean nor her

counsel appeared. The trial court, obviously and understandably frustrated with the progress of the case, engaged in the following conversation with Reed's counsel:

“[Court]: Well, counsel, I think you're aware that under Trial Rule 56 the Court can give a partial or a full summary judgment. What do you want?

[Counsel]: Well, since it's not my motion for summary judgment . . .

[Court]: Well, it doesn't have to be your motion.

[Counsel]: I would ask the Court to enter judgment in favor of the Defendant, Your Honor, and I'm more than willing to provide information for the Court's file. Although if you look at [Dean's] complaint, you will see the commercial lease attached to the complaint and the document sued upon is one not executed by her, and one not authorizing her to occupy the property.

[Court]: Okay.

[Counsel]: Given the fact that there was a [Trial Rule] 41(e) dismissal in this case, then after the dismissal – not before, but after – then Plaintiff's counsel stepped forward and started pursuing the action. I know the Court also has discretion to reinstitute that 41(e) dismissal.

[Court]: Well, which way do you want me to go?

[Counsel]: I'd just as soon have a judgment, Your Honor, in favor of the Defendant.

[Court]: That's what I thought.

[Counsel]: That would save my client time and money – not that I don't enjoy being here with you. . . .

[Court]: Okay. I'm granting a summary judgment to your client. . . .”
Tr. at 3-4.

As it had indicated, the trial court entered an order granting full summary judgment in favor of Reed on October 11, 2005. Dean, on October 19, 2005, filed a motion for clarification of order, or in the alternative, a motion to correct error. In this motion, Dean's counsel claimed that a scheduling error had prevented him from attending the September 19 summary judgment hearing. The trial court set the matter for a hearing

on December 15, 2005. After the December 15, 2005 hearing, at which Dean or her counsel again failed to appear, the trial court denied the motion to clarify/motion to correct error. Dean filed a notice of appeal on January 13, 2006.

Before addressing the merits of this appeal, we note that Reed has failed to file an Appellee's Brief in this court. On June 12, 2006, Dean filed a motion in this court to substitute a corrected Appellant's Brief for her original. On June 19, 2006, this court issued an order which reads in relevant part:

- “(1) Appellant's deadline to file her Appellant's Brief had not expired when she tendered her substitute Appellant's Brief.
- (2) Accordingly, Appellant's Motion to Substitute Corrected Appellant's Brief for Appellant's Original Filing is GRANTED.
- (3) As Appellant has tendered with the Clerk of this Court her substituted Brief, the Clerk is DIRECTED to file the Brief as of June 12, 2006.
- (4) Appellee's Brief shall be due on or before thirty (30) days from the date of this order.”

On July 16, 2006, Reed filed in this court a request for an extension of time in which to file his Appellee's Brief. The Clerk of this Court noted in the appellate docket that Reed's attorney had not yet filed an appearance in this Court and “held [the request] on my desk pending response from atty.” The docket does not indicate that Reed's attorney ever responded.

The end result is that we are left with only the Appellant's Brief. When an appellee fails to submit a brief, an appellant may prevail by making a prima facie case of error. Dominiack Mechanical, Inc. v. Dunbar, 757 N.E.2d 186, 188 n.1 (Ind. Ct. App. 2001). The prima facie error rule is that this court is not required to controvert arguments advanced for reversal, a duty which remains with the appellee. Id. We must nevertheless

correctly apply the law to the facts in the record in order to determine whether reversal is required. Id.

Dean argues that the trial court erred in several respects when it granted summary judgment in favor of Reed. Dean claims that the trial court may not grant summary judgment in favor of a non-moving defendant where there was neither a response nor a cross-motion for summary judgment filed by the defendant. A review of the language of Trial Rule 56 reveals this not to be true. Trial Rule 56(B) specifically provides that “[w]hen any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party.” As stated by the court in Shah v. Harris, 758 N.E.2d 953, 955 (Ind. Ct. App. 2001), trans. denied, “when a party files a motion for summary judgment, that movant bears the risk of entry of summary judgment in favor of the non-movant, even though the non-movant has not filed a cross-motion for summary judgment.” Thus, the trial court could properly grant summary judgment—upon the issue presented in the motion—to either Dean or Reed.

Further, although the movant has the initial burden of establishing an entitlement to a judgment as a matter of law, the non-movant may rest upon the pleadings until the movant meets this burden. Sharp v. Town of Highland, 665 N.E.2d 610, 617 (Ind. Ct. App. 1996) (citing T.R. 56(E)), trans. denied; Winbush v. Memorial Health Systems, Inc., 581 N.E.2d 1239, 1243 (Ind. 1991)). Thus, the trial court is not required to grant a motion for summary judgment simply because the non-movant has not filed a response thereto. Indeed, if the facts designated by the moving party were somehow to

demonstrate that the non-movant was instead entitled to summary judgment, the trial court may grant summary judgment in favor of the non-moving party. Thus, to the extent that Dean claims the trial court erred in granting summary judgment to Dean simply because Reed had neither moved nor responded to Dean's motion, she is mistaken.¹

Dean's remaining arguments seem to be contradictory. She claims that the record "clearly showed that there existed genuine issues of material fact, precluding summary judgment against [Dean] on all of her claims." Appellant's Br. at 5. In the next sentence, however, Dean claims that Reed "did not and cannot demonstrate that any genuine issue of material fact existed with regard to Dean's wrongful conversion and treble damages claim against [Reed]." Dean cannot have it both ways. Either there are genuine issues of material fact precluding summary judgment, either for or against Dean, "on all of her claims," or there are no genuine issues of material fact with regard to the conversion claim.

Here, Dean designated her affidavit, the first page of a lease agreement, and her itemized list of the property she claims was converted along with the claimed value thereof. This designated evidence reveals that Dean was leasing the premises from Reed and was operating her business at the premises.² Dean averred in her affidavit that Reed

¹ Because Dean presumes, albeit incorrectly, that the trial court could not grant summary judgment to Reed because he had neither filed a cross-motion for summary judgment nor responded to Dean's motion, she also claims that the trial court improperly granted an "unfiled," i.e. oral, motion for summary judgment of which she was not given notice. Again, however, Reed need not have moved for summary judgment to be granted summary judgment. See Shah, 758 N.E.2d at 955.

² In her affidavit, Dean asserts that "[a]t all times material to this cause of action, Reed was [Dean's] landlord" at the business premises in question. App. at 27. This is corroborated by Reed's answer to Dean's complaint, in which he admitted the allegation contained in paragraph two of Dean's complaint, wherein she alleged that Reed "was the landlord of [Dean]" at the business premises. App. at

refused her entrance to the business premises. Dean also stated in her affidavit that she had \$25,982.26 worth of personal property located at the premises at the time she was evicted, and the itemized list describes how Dean came to this figure.

Dean also asserted that “Reed unlawfully evicted her from the demised premises” App. at 28 (emphasis supplied). Whether Dean was “unlawfully” evicted is a question of law. Dean’s affidavit is, to that extent, conclusory, and conclusory statements should be disregarded when determining whether to grant or deny a summary judgment motion. See Paramo v. Edwards, 563 N.E.2d 595, 600 (Ind. 1990); see also Ind. Trial Rule 56(E). The statement in Dean’s affidavit that Reed made “false and defamatory statements” about her to the public and her customers is, in part, similarly conclusory. App. at 29.

The portion of Dean’s affidavit stating that Reed “converted”³ her property is also conclusory and does not adequately explain, factually, how Reed knowingly or intentionally exerted unauthorized control over her property. Whether Reed did or did not criminally convert the property is a question of law, Dean’s affidavit is conclusory in this regard, and we will not consider it for purposes of summary judgment. See Paramo,

8, 15. The lease agreement designated by Dean, however, is a lease agreement between Reed and a Kim Hatton, not between Reed and Dean. However, it is apparent from the designated evidence that Reed was indeed Dean’s landlord, whether or not the arrangement between the parties was set forth in the lease agreement.

³ A victim of criminal conversion may bring a civil action against the person who caused the loss and recover, among other things, treble damages, costs, and reasonable attorney’s fees. Ind. Code § 34-24-3-1 (Burns Code Ed. Repl. 1998). A person commits criminal conversion when that person “knowingly or intentionally exerts unauthorized control over property of another person” Ind. Code § 35-43-4-3 (Burns Code Ed. Supp. 2006); see also Dominiack Mechanical, 757 N.E.2d at 188 n.2 (discussing differences between tortious conversion, criminal conversion, and a victim of criminal conversion seeking civil recovery).

563 N.E.2d at 600. Thus, the evidence designated by Dean, which was the only designated evidence before the trial court, did not, as Dean argues, compel summary judgment in her favor with regard to the conversion claim.

That having been said, we do agree that the trial court erred in granting summary judgment in favor of Reed on all of Dean's claims. First, Dean moved for summary judgment only upon her claim of conversion. Although the trial court could grant summary judgment upon that claim in favor of either party, if the designated evidence so warranted, the trial court could not grant summary judgment to Reed on all of Dean's claims when Dean moved only for a partial summary judgment. Trial Rule 56(B), although providing that the trial court may grant summary judgment to any party when the other party has moved for summary judgment, states that the trial court may grant summary judgment for the non-moving party "upon the issues raised by" the motion. Here, the only issue presented in Dean's motion was with regard to her claim for conversion. The other four counts of her complaint were not implicated by her motion for summary judgment. As such, those issues were not raised by Dean's motion, and the trial court could not properly grant summary judgment upon those claims in favor of either Dean or Reed. See Simon Property Group, L.P. v. Michigan Sporting Goods Distributors, Inc., 837 N.E.2d 1058, 1068 (Ind. Ct. App. 2005) (where moving party sought summary judgment only on the issue of remedies available for breach of lease, trial court could not have properly granted summary judgment upon issue of breach of the lease because that issue was not raised in the motion for summary judgment, and the trial court properly denied summary judgment upon the non-raised issue), trans. denied.

We note here that we understand the trial court's loss of patience in the present case. This was a case which had been languishing on the court's docket without significant progress for years. Both parties had failed to appear for pre-trial conferences, and the case had even been dismissed once for failure to prosecute but later reinstated. The plaintiff ultimately failed to appear at the hearing upon her own motion for summary judgment. Had the trial court exercised its discretion in dismissing the case yet again for failure to prosecute, we cannot say that the trial court would have erred in so doing. However, in granting summary judgment to Reed upon all of Dean's claims when Dean had moved only for partial summary judgment and when the designated evidence, which was submitted solely by Dean, did not support summary judgment, the trial court's actions, however understandable, were improper.

The judgment of the trial court is reversed, and the cause is remanded for proceedings consistent with this opinion.

ROBB, J., and BARNES, J., concur.